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2
3 UNITED STATES DISTRICT COURT

4 DISTRICT OF NEVADA

5 * * *

6 ANDRE KING-HARDIMAN,

Case No. 3:19-cv-00484-MMD-CSD

7 Petitioner,

ORDER

8 v.

9 GITTERE, *et al.*,

10 Respondents.

11 **I. SUMMARY**

12 This is a habeas corpus action under 28 U.S.C. § 2254. Petitioner Andre King-
13 Hardiman has filed a first amended petition. (ECF No. 19 ("Amended Petition").) Before
14 the Court is Respondents' motion to dismiss (ECF No. 35 ("Motion")) the Amended
15 Petition (ECF No. 19).¹ The Court finds that two grounds of the Amended Petition relate
16 back to the initial petition (ECF No. 1-1), that one ground does not relate back, and that
17 ground 1 of the Amended Petition was exhausted in the state courts. The Court will
18 therefore grant the Motion in part and deny it in part.

19 **II. BACKGROUND**

20 King-Hardiman was charged with one count each of murder, invasion of the home,
21 burglary, and robbery. For each count, King-Hardiman also was charged with committing
22 the felony in violation of a domestic-violence protection order. (Exh. 43, ECF No. 36-14
23 (amended superseding indictment).)² The prosecution intended to seek the death penalty.

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25 _____

26 ¹King-Hardiman opposes the Motion (ECF No. 49), and Respondents filed a reply
(ECF No. 54).

27 ²King-Hardiman filed exhibits in support of his Amended Petition, numbered 1-29.
28 (ECF No. 21, 22.) Respondents filed exhibits in support of their Motion, continuing the
numbering sequence that Petitioner started. (ECF No. 36 through 44). The Court will cite
to the exhibits without stating whether they are King-Hardiman's exhibits or Respondents'
exhibits because they use the same sequence.

1 (Exh. 36, ECF No. 36-7.) On February 11, 2014, the day that the jury trial was scheduled
2 to begin, King-Hardiman and the prosecution reached a guilty plea agreement. King-
3 Hardiman would plead guilty to first-degree murder and the other charges in the amended
4 superseding indictment. The prosecution would withdraw the notice of intent to seek the
5 death penalty. The prosecution retained the right to argue for any other lawful sentence,
6 including life imprisonment without the possibility of parole for first-degree murder. (Exh.
7 3, ECF No. 20-3.) King-Hardiman pleaded guilty and the trial court accepted his plea.
8 (Exh. 4, ECF No. 20-4.)

9 On May 21, 2014, King-Hardiman filed a proper-person motion to withdraw his plea
10 and a proper-person motion to dismiss counsel. (Exh. 5, ECF No. 20-5; Exh. 6, ECF No.
11 20-6.) In a hearing on June 11, 2014, before a different state district judge, the state
12 district court denied King-Hardiman's motions. (Exh. 7, ECF No. 20-7.) On June 13, 2014,
13 King-Hardiman's counsel filed a motion to withdraw. (Exh. 8, ECF No. 20-8.) In a hearing
14 on June 23, 2014, before the state district judge who presided over the case, the state
15 district court denied the motion. (Exh. 9, ECF No. 20-9.) On July 18, 2014, the state district
16 court convicted and sentenced King-Hardiman to life imprisonment without the possibility
17 of parole for first-degree murder, 48 to 120 months for home invasion, 48 to 120 months
18 for burglary, and 72 to 180 months for robbery. (Exh. 13, ECF No. 20-13.) All sentences
19 run concurrently. (*Id.*) The state district court entered its judgment of conviction on July
20 21, 2014. (Exh. 14, ECF No. 20-14.)

21 King-Hardiman appealed. (Exh. 174, ECF No. 42-9.) The Nevada Supreme Court
22 transferred the appeal to the Nevada Court of Appeals. (Exh. 191, ECF No. 42-26.) On
23 September 15, 2015, the Nevada Court of Appeals affirmed. (Exh. 18, ECF No. 21-3.) On
24 December 3, 2015, the remittitur issued. (Exh. 19, ECF No. 21-4.)

25 On December 2, 2016, King-Hardiman filed a post-conviction habeas corpus
26 petition in the state district court. (Exh. 21, ECF No. 21-6.) He filed a supplemental petition
27 on September 22, 2017. (Exh. 208, ECF No. 43-12.) The state district court denied the
28 petition on April 19, 2018. (Exh. 24, ECF No. 21-9.)

1 King-Hardiman appealed. (Exh. 214, ECF No. 44-1.) The Nevada Supreme Court
 2 transferred the appeal to the Nevada Court of Appeals. (Exh. 225, ECF No. 44-12.) On
 3 July 17, 2019, the Nevada Court of Appeals affirmed. (Exh. 28, ECF No. 21-13.) Remittitur
 4 issued on August 13, 2019. (Exh. 29, ECF No. 21-14.)

5 King-Hardiman mailed his § 2254 petition to this Court from prison, with a postmark
 6 date of August 8, 2019. (ECF No. 1-1 at 9.) On January 9, 2020, the Court dismissed the
 7 action because King-Hardiman had not paid the filing fee. (ECF No. 7.) King-Hardiman
 8 paid the filing fee and filed another habeas corpus petition on February 3, 2020. (ECF
 9 Nos. 9, 10.) On February 14, 2020, the Court reopened the action because the statute of
 10 limitations of 28 U.S.C. § 2244(d)(1)(A) had run soon after King-Hardiman commenced
 11 this action; any new action that he commenced would be untimely. (ECF No. 11.) The
 12 Court also noted that the sole claim in the new petition was the same as the sole claim in
 13 the original petition, and thus it related back to the original petition. (*Id.*) The Court also
 14 appointed counsel to represent King-Hardiman. (*Id.*) King-Hardiman filed his Amended
 15 Petition on May 20, 2020. (ECF No. 19.) Respondents' Motion followed. (ECF No. 35.)

16 **III. LEGAL STANDARD**

17 **A. Timeliness**

18 King-Hardiman had one year from the date his judgment of conviction became final
 19 to file a petition under § 2254 in this Court. 28 U.S.C. § 2244(d)(1)(A). The judgment of
 20 conviction became final when the time to petition the Supreme Court of the United States
 21 expired. *Jimenez v. Quarterman*, 555 U.S. 113, 119-20 (2009).

22 The time King-Hardiman spent pursuing his state post-conviction habeas corpus
 23 petition did not count toward this one-year limitation period. See 28 U.S.C. § 2244(d)(2).
 24 The period of limitation resumed when the post-conviction judgment becomes final upon
 25 issuance of the remittitur. *Jefferson v. Budge*, 419 F.3d 1013, 1015 n.2 (9th Cir. 2005).

26 An amended habeas corpus petition "does not relate back (and thereby escape
 27 [§ 2244(d)(1)(A)'s] one-year time limit) when it asserts a new ground for relief supported
 28 by facts that differ in both time and type from those the original pleading set forth." *Mayle*

1 *v. Felix*, 545 U.S. 644, 650 (2005). Relation back is allowed “[s]o long as the original and
 2 amended petitions state claims that are tied to a common core of operative facts” *Id.*
 3 at 664.

4 **B. Exhaustion of State-Court Remedies**

5 Before this Court may consider a petition for a writ of habeas corpus, the petitioner
 6 must exhaust the remedies available in state court. See 28 U.S.C. § 2254(b). To exhaust
 7 a ground for relief, the petitioner must fairly present that ground to the state’s highest
 8 court, describing the operative facts and legal theory, and give that court the opportunity
 9 to address and resolve the ground. *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (per
 10 curiam); *Anderson v. Harless*, 459 U.S. 4, 6 (1982).

11 “[A] petitioner for habeas corpus relief under 28 U.S.C. § 2254 exhausts available
 12 state remedies only if he characterized the claims he raised in state proceedings
 13 specifically as federal claims. In short, the petitioner must have either referenced specific
 14 provisions of the federal constitution or statutes or cited to federal case law.” *Lyons v.*
 15 *Crawford*, 232 F.3d 666, 670 (9th Cir. 2000) (emphasis in original), *amended*, 247 F.3d
 16 904 (9th Cir. 2001). Citation to state case law that applies federal constitutional principles
 17 will also suffice. *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc).

18 **IV. DISCUSSION**

19 **A. Timeliness**

20 The Nevada Court of Appeals affirmed the judgment of conviction on September
 21 15, 2015. (Exh. 18, ECF No. 21-3.) The judgment of conviction became final on December
 22 14, 2015, when the time to file a petition for a writ of certiorari expired. See Sup. Ct. R.
 23 13(1).

24 When King-Hardiman filed his state post-conviction habeas corpus petition on
 25 December 2, 2016, 353 days in the one-year period had passed. (Exh. 21, ECF No. 21-
 26 6.) The one-year period then was tolled under § 2244(d)(2) until the remittitur issued at
 27 the end of the post-conviction appeal process, on August 13, 2019. (Exh. 29, ECF No.
 28 21-14.)

1 King-Hardiman's initial § 2254 petition (ECF No. 1-2) was effectively filed August
 2 8, 2019, when it was postmarked. See Rule 3(d), Rules Governing Section 2254 Cases
 3 in the United States District Courts.³

4 The one-year period of § 2244(d)(1)(A) expired at the end of August 29, 2019. All
 5 claims in the first amended petition (ECF No. 19) must relate back to the initial petition to
 6 be timely. The sole claim in the initial petition was, in full⁴:

7 ~~Petitioner's misconception of the impossible sentence structure, clearly
 8 shows, on the record, Petitioner refused any kind of Life sentence.
 9 However, because of the erroneous statement by the trial judge was the
 10 primary basis for Petitioner's erroneous idea that Petitioner can spend
 11 exclusively 20 yrs in prison, be released & live the rest of his life without the
 12 possibility of parole & plead guilty. Therefore~~

13 The failure of an attorney to correct &/or even object to the courts on the
 14 untenable sentence structure (20 to life without the possibility of parole) is
 15 an omission that it cannot be said to fall within the wide range of professional
 16 competent assistance, which is demanded by the 6th and 14th
 17 Amendments & when not fulfilled is a blatant violation of the 'fair trial' &
 18 'equal protection' clauses.

19 (ECF No. 1-1 at 3.)

20 The sentence structure described above came from the following statements by
 21 the judge at the change-of-plea hearing. In describing the potential sentences for first-
 22 degree murder, the judge first said, "20 to 50, a definite term; a life – 20 on the bottom, a
 23 life with the possibility of parole; or *20 on the bottom, life without the possibility of parole*.
 24 Those are the range of punishments, but the death penalty is off the table." (Exh. 4, ECF
 25 No. 20-4 at 6 (emphasis added).) Then, after a recess, the judge said, "The range of
 26 punishment on a murder, first degree murder, is 20 to 50 years, it's 20 to life with the
 27 possibility of parole or it's *20 to life without the possibility of parole* and no one can promise

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³Rule 3(d) actually states that the date of effective filing is the date that the petitioner delivered the petition to prison officials for forwarding to the court. That might have been earlier than August 8, 2019, but King-Hardiman did not provide that date. Additionally, § 2254(d)(2) still was tolling the one-year period, so the actual date of delivery makes no difference to the calculations of timeliness.

⁴The Court assumes that King-Hardiman wanted the Court not to consider the stricken text. The Court reproduces it for the sake of completeness and in case the Court's assumption is incorrect.

1 you any outcome. *So the minimum you're looking at is 20 on the bottom and a potential*
 2 *life without.*" (*Id.* at 8 (emphasis added).)

3 With the intent to seek the death penalty withdrawn, first-degree murder in Nevada
 4 has three potential sentences of imprisonment: (1) life without the possibility of parole, (2)
 5 life with eligibility for parole beginning after a minimum of 20 years, and (3) 50 years with
 6 eligibility for parole beginning after a minimum of 20 years. See NRS § 200.030(4)(b).

7 **1. Ground 1 Relates Back**

8 In ground 1, King-Hardiman argues that his guilty plea was unknowing and
 9 involuntary because he did not understand the potential sentences for first-degree murder
 10 due to the judge misstating them. (ECF No. 19 at 17-20.) This ground and the ground in
 11 the initial petition share a common core of operative fact: the judge misstated the potential
 12 sentences for first-degree murder, and King-Hardiman did not understand his possible
 13 exposure to life imprisonment without the possibility of parole. Ground 1 is a claim of an
 14 invalid guilty plea, and the ground in the initial petition is a claim of ineffective assistance
 15 of counsel, but the facts, not the legal theories, are relevant for relation back. See *Ha Van*
 16 *Nguyen v. Curry*, 736 F.3d 1287, 1297 (9th Cir. 2013), *abrogated on other grounds by*
 17 *Davila v. Davis*, 137 S. Ct. 2058 (2017). Ground 1 therefore relates back to the initial
 18 petition.

19 **2. Ground 2 Does Not Relate Back**

20 In ground 2, King-Hardiman claims that he was denied his right to counsel because
 21 trial counsel Charles Cano coerced King-Hardiman into pleading guilty during the recess
 22 in the change-of-plea hearing. King-Hardiman further claims that they thus had an
 23 irreconcilable conflict, which the state court did not remedy later by appointing substitute
 24 counsel in the hearings in June and July 2014. (ECF No. 19 at 20-21 (referencing ECF
 25 No. 19 at 8-10).) Nothing in ground 2 mentions the trial court misstating the potential
 26 sentences. Likewise, nothing in the ground in the initial petition mentions Cano coercing
 27 King-Hardiman into pleading guilty or King-Hardiman's efforts to have Cano dismissed
 28 and substitute counsel appointed. Petitioner asks the Court to construe the initial petition

1 liberally, but liberal construction does not include implying facts that appear nowhere in
2 the petition. (ECF No. 49 at 4-5.) A failure to object to a misstatement by the state judge
3 is not the same as coercing King-Hardiman to plead guilty during a court recess. A
4 change-of-plea hearing is not the same as hearings on motions to dismiss counsel 4 to 5
5 months later. The facts in the two claims differ in time and type. Ground 2 does not relate
6 back, and the Court therefore will dismiss it.

7 Respondents also argue that ground 2 is not subject to federal habeas corpus relief
8 because the Supreme Court of the United States has not clearly established federal law
9 whether an irreconcilable conflict between client and counsel constitutes the denial of
10 counsel. (ECF No. 35 at 7-10). The Court will not address this argument because the
11 Court is dismissing ground 2 as untimely.

12 **3. Ground 3 Relates Back**

13 In ground 3, King-Hardiman claims that trial counsel failed to inform King-Hardiman
14 adequately about the direct consequences of his guilty plea, namely, how the potential
15 sentencing ranges functioned. (ECF No. 19 at 21-24.) This is the same claim as ground
16 1 of the initial petition. They both have the same core of operative facts: the state district
17 court gave an incorrect potential sentence range, and counsel failed to correct it. Ground
18 3 relates back to the initial petition.

19 **B. Exhaustion**

20 Respondents argue that King-Hardiman has not exhausted his state-court
21 remedies for ground 1, a claim that his guilty plea was unknowing and involuntary,
22 because he did not present the claim to the state courts as a violation of federal
23 constitutional law. The Court disagrees. In the opening brief on direct appeal, discussing
24 the elements of a knowing and voluntary guilty plea, King-Hardiman quoted *Hanley v.*
25 *State*, 624 P.2d 1387, 1389 (Nev. 1981), *abrogated on other grounds by Woods v. State*,
26 958 P.2d 91 (Nev. 1998). (Exh. 15, ECF No. 20-15 at 23.) In turn, *Hanley* stated that it
27 was applying federal law as determined by the Supreme Court of the United States in
28 *Boykin v. Alabama*, 395 U.S. 238 (1969), regarding the validity of guilty pleas. *Hanley*,

1 624 P.3d at 1389. The citation of a state-court case that applies federal constitutional
2 principles is sufficient to exhaust the claim in state court. *Peterson*, 319 F.3d at 1158.
3 Because the Court finds that ground 1 is exhausted, Respondents' Motion will be denied
4 as to the exhaustion argument.

5 **V. CONCLUSION**

6 It is therefore ordered that Respondents' motion to dismiss (ECF No. 35) is granted
7 in part and denied in part. Ground 2 of the first amended petition (ECF No. 19) is
8 dismissed because it is untimely. In all other respects, Respondents' motion to dismiss is
9 denied.

10 It is further ordered that Respondents will have 60 days from the date of entry of
11 this order to file and serve an answer to the first amended petition, which must comply
12 with Rule 5 of the Rules Governing Section 2254 Cases in the United States District
13 Courts. King-Hardiman will have 30 days from the date on which the answer is served to
14 file a reply.

15 DATED THIS 11th Day of March 2022.



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17 MIRANDA M. DU
18 CHIEF UNITED STATES DISTRICT JUDGE
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